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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 57

JOSEPH E. SNOWDEN,

petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE RESPONDENTS ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED.

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Statement of the case.

This case is here on writ of certiorari granted June 7, 1943, to review the judgment of the Circuit Court of Appeals for the Seventh Circuit (opinion reported, 132 F. 2d 476).

The plaintiff (petitioner) filed a complaint for damages in the district court under the Civil Rights Act of April

20, 1871. (R. 2-10.) Three separate motions were filed to dismiss the plaintiff's complaint, one by the defendant Edward J. Hughes (R. 10-11), one by the defendant Louie E. Lewis (R. 15-16), and one by the defendants Robert E. Straus, Eli M. Straus and James Levy, as co-executors of the last will and testament of Henry Horner, deceased (R. 12-14). Orders were entered by the district court sustaining said motions generally (R. 14, 17-18), not solely "for lack of jurisdiction," as erroneously noted by the reporter (132 F. 2d 476).

Plaintiff's complaint.

The plaintiff's complaint is highly artificial. The plaintiff says that on April 9, 1940 a primary election was to be held in the third senatorial district of Illinois to nominate candidates for the office of representative in the general assembly of Illinois; that three representatives were to be elected from the third senatorial district; that the Democratic Senatorial Committee for the third district, by proper resolution (adopted pursuant to statute) decided that only one candidate was to be chosen to run on the Democratic ticket; that the Republican Senatorial Committee for the third district resolved that two candidates should be chosen to run on the Republican ticket; that the canvass of votes cast, as returned by the Board of Election Commissioners of Cook County to the Secretary of State and as published by the latter, showed that the top Democratic candidate received 30,009 votes, the top Republican candidate (Jenkins) 12,781½ votes, the second Republican candidate (Snowden) 3,375½ votes. (R. 6-7.)

It is not alleged directly, anywhere in the complaint, that the canvass of votes as returned by the Board of Election Commissioners of Cook County and as published by the Secretary of State *was a true and complete statement of all the votes actually cast at the primary for candidates for the office of representative.* In truth, as stated by plain-

tiff's counsel in response to questions propounded by the justices of the circuit court of appeals, there was another Republican candidate who received more votes than plaintiff, but whose votes were not shown in the return made by the canvassing board because he was then dead.

The complaint thereupon charges that the members of the State Primary Canvassing Board of Illinois, namely, Henry Horner (governor), Edward J. Hughes (secretary of state) and Louie E. Lewis (state treasurer), "wilfully, maliciously and arbitrarily" refused to issue an official proclamation designating the plaintiff as one of the nominees of the Republican party for the office of representative, but instead issued a proclamation designating only one nominee for each party. (R. 7-8.) Here, again, the complaint stops short and does not allege that at the election there was in fact only one Republican candidate instead of two; or, if in fact there were two Republican candidates, in what manner the second Republican candidate was nominated.

Motion to dismiss.

The motion to dismiss plaintiff's complaint filed by the defendants Robert E. Straus, Eli M. Straus and James Levy, executors, was based upon three separate grounds: (1) that the complaint failed to state facts sufficient to indicate a claim upon which relief could be granted; (2) that it affirmatively appeared from the complaint that the district court had no jurisdiction of the subject matter; (3) that it affirmatively appeared from the complaint that the cause of action, if any, which might have existed against Henry Horner during his lifetime, had abated by his death and did not survive against his executors.

Order of district court.

As already stated, the order of the district court was a general order of dismissal, not limited to lack of jurisdiction. (R. 14.)

Opinion of circuit court of appeals.

The opinion of the circuit court of appeals, because it disposed of the case on other grounds, made no mention of the point urged by these respondents that the cause of action, if any, which might have been asserted against Henry Horner during his lifetime, had abated by his death and did not survive against his executors.

The petition for certiorari and brief in support thereof ignore this contention. The point was mentioned briefly, with citation of three decisions of this court, in the brief of these respondents opposing the petition for certiorari. No additional brief has since been filed on behalf of the petitioner. The primary purpose of the present brief is to amplify the proposition that the plaintiff's complaint states no cause of action against these respondents, as executors, by reason of the alleged wrongful conduct of the late Henry Horner.

Summary of the argument.

I.

A cause of action under the Civil Rights Act does not survive the death of the alleged wrongdoer.

(A) Neither the Civil Rights Act itself, nor any other federal statute, provides for the survival of a cause of action arising under the Civil Rights Act.

Civil Rights Act:—8 U. S. C. A. §§ 43 and 47; R. S. §§ 1979 and 1980.

(B) When a cause of action is given by a federal statute not itself containing any provision for survival of the action, the question of survival is to be determined in accordance with the common law.

Schreiber v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65.

Walsh v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, 495; affd. 223 U. S. 1, 56 L. ed. 327.

Sullivan v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, 1004.

See also:

Deitrick v. *Greaney*, 309 U. S. 190, 200, 84 L. ed. 694, 701.

Clearfield Trust Co. v. *United States*, 87 L. ed. 524, 526.

(C) At common law, in an action sounding in tort, there was no survival of the cause of action against the representatives of the alleged wrongdoer unless the deceased increased his own estate by means of the alleged wrongful act.

Walsh v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, 495; affd. 223 U. S. 1, 56 L. ed. 327.

Michigan Central R. R. Co. v. *Vreeland*, 227 U. S. 59, 67, 33 S. Ct. 192, 57 L. ed. 417, 420.

Bank of Iron Gate v. *Brady*, 184 U. S. 665, 46 L. ed. 739.

Sullivan v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, 1004-1012.

Van Choate v. *General Electric Co.* (D. C. Mass.), 245 Fed. 120, 121.

Barnes Coal Corp. v. *Retail Coal Merchants Asso.* (C. C. A. 4), 128 F. 2d 645, 649.

Knox, Administrator v. *City of Sterling*, 73 Ill. 214.

Wilcox v. *Bierd*, 330 Ill. 571, 583, 585, 162 N. E. 170, 175, 176.

Selden v. *Illinois Trust & Savings Bank*, 239 Ill. 67, 77, 87 N. E. 860, 863.

Olson v. *Scully*, 296 Ill. 418, 420, 129 N. E. 841, 842.

II.

The complaint fails to state a cause of action under the Civil Rights Act.

(A) Assuming, on the motion to dismiss plaintiff's complaint, that when the members of the State Primary Canvassing Board omitted the name of the plaintiff as nominee for the office of state representative they misconstrued or misapplied the election laws of Illinois, such decision and action did not violate any right of the plaintiff protected by the 14th amendment.

Taylor v. *Beckham*, 178 U. S. 545, 567, 570; 44 L. ed. 1187, 1194, 1198.

(B) The right or privilege of the plaintiff to be a candidate for the office of state representative was a right or privilege of state citizenship, dependent solely upon state

law; not a right, privilege, or attribute of national citizenship, specially protected by the 14th amendment.

Carter v. *Greenhow*, 114 U. S. 317, 5 S. Ct. 928; 29 L. ed. 202.

Madden v. *Kentucky*, 309 U. S. 83, 90; 84 L. ed. 590, 594.

Love v. *Chandler* (C. C. A. 8), 124 F. 2d 785 (and the cases therein cited).

Brawner v. *Irvin* (C. C. Ga.), 169 Fed. 964.

United States v. *Moore* (C. C. Ala.), 129 Fed. 630.

(C) Plaintiff's complaint, tested by its averments of facts and ignoring its conclusions, does not show or tend to show that the members of the State Primary Canvassing Board caused the state of Illinois to deny to the plaintiff "the equal protection of the laws," but only that the members of the board made an erroneous decision in the particular case.

Mitchell v. *Greenough* (C. C. A. 9), 100 F. 2d 184; cert. den. 306 U. S. 659, 83 L. ed. 1055.

(D) The facts alleged in plaintiff's complaint do not show or tend to show that the members of the State Primary Canvassing Board caused the state of Illinois to deprive the plaintiff of life, liberty or property without "due process of law."

Taylor v. *Beckham*, 178 U. S. 545, 44 L. ed. 1187.

ARGUMENT.

I.

Plaintiff's alleged cause of action, so far as it relates to the conduct of Henry Horner, did not survive Horner's death.

The plaintiff did not file a suit until after the death of Henry Horner. The plaintiff claims that he was "injured in his property" by alleged wrongful deprivation of the opportunity to be a candidate for election as a representative in the general assembly of Illinois; but not that the members of the State Primary Canvassing Board of Illinois, consisting in 1940 of the governor, the late Henry Horner, the secretary of state, Edward J. Hughes, and the state treasurer, Louie E. Lewis, of whose decision he complains, in any manner appropriated to themselves any of his property.

The Civil Rights Act contains no provision for survival of any cause of action arising thereunder. There is no general federal statute governing survival of actions.* The result is that on a claim arising from a federal statute, where the statute itself makes no provision for survival, the question whether the cause of action survives the death of the alleged wrongdoer must be decided in accordance with the common law.

* Rule 25 of the Code of Civil Procedure for the federal district courts provides that "if a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper authorities." Rule 25 is applicable only to an action pending at the time of the death and does not of itself undertake to specify when the claim is extinguished by the death and when not extinguished. (*Gerling* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 692, 38 L. ed. 311, 318.)

The Illinois statutes on abatement or survival of actions can have no bearing on a suit to recover damages under the federal Civil Rights Act.

In *Schreiber* v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65, suit was instituted in the federal district court to recover penalties imposed by an act of congress for infringement of a copyright. Upon the death of the defendant Sharpless, before judgment, the plaintiffs sued out a *scire facias* against the executors of the will of Sharpless requiring them to appear and become parties to the action, or show cause why they should not be made parties by order of the court. A motion to quash the writ was granted. Thereupon the plaintiffs applied to this court for a writ of mandamus requiring the district court to reinstate the writ of *scire facias* and this application was denied. This court said:

> "* * * The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. * * * Whether an action survives, depends on the substance of the cause of action, not on the forms of proceeding to enforce it. As the nature of penalties and forfeitures imposed by act of congress cannot be changed by state laws, it follows that state statutes allowing suits on state penal statutes to be prosecured after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress."

From the learned opinion of Mr. Justice Rogers in *Sullivan* v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, devoted to a comprehensive discussion of the question whether a cause of action under the Sherman Anti-trust Act could be prosecuted against the executors of a deceased defendant, we quote the following (p. 1004):

> "* * * While the statutes of the United States prescribe the methods for reviving actions which survive, they do not prescribe what causes of action shall sur-

vive. The language of the statute above set forth is, 'in case the cause of action survives by law,' the executor or administrator may prosecute or defend, etc.; and as there is no other federal statute on the subject the question naturally arises what is meant by the phrase 'by law' in the connection in which it is used. It does not refer to state law; for the statutes of a state are plainly without application to cases which originate under an act of congress. A cause of action which is given by a federal statute, if no specific provision is made by act of congress for its survival, survives or not according to the principles of the common law."

The case of *Walsh* v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, affd. 223 U. S. 1, 56 L. ed. 327, was a suit under the federal employers' liability act. The injured employee had died and his administratrix brought suit seeking to recover, among other things, for the conscious suffering of the employee prior to his death. The defendant demurred to this part of the declaration, contending that the cause of action which the employee had during his lifetime to recover for conscious suffering did not survive to his administratrix. The court sustained the demurrer:

"As the cause of action is given by a federal statute, this court cannot have recourse to a state statute in order to determine whether the cause of action survives or not * * *. This section [28 U. S. C. A. 778] does not itself provide what causes of action shall survive, but, in the absence of other controlling statute, leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable, there is no general federal statute, and the particular statute in question * * * says nothing about survival.

"Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive * * *."

It is a well settled rule in Illinois that a cause of action created by statute does not survive unless declared so to do by the statute itself, or unless provision for its survival

is made by some other statute. (*Wilcox* v. *Bierd*, 330 Ill. 571, 583, 585, 162 N. E. 170, 176; *Olson* v. *Scully*, 296 Ill. 418, 424; *Selden* v. *Illinois Trust & Savings Bank*, 239 Ill. 67, 77.) Manifestly, under this rule, no statute of Illinois could have any bearing upon a cause of action created by an act of congress.

To state the applicable rule of common law presents no difficulty. In an action *ex delicto*, the common law rule was that if a party increased his own estate by wrongfully taking another's property, an action for such injury would survive his death and might be prosecuted against his personal representative; but not if the decedent had received no benefit and had not increased his estate by means of the wrongful act. (*Bank of Iron Gate* v. *Brady*, 184 U. S. 665, 46 L. ed. 739; see also *Patton* v. *Brady*, 184 U. S. 608, 614, 46 L. ed. 713, 717.)

As stated in *Van Choate* v. *General Electric Co.* (D. C. Mass.), 245 Fed. 120, 121:

> "* * * In causes of action which arise solely under the laws of the United States, survivorship is determined according to the principles of the common law. *Schreiber* v. *Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65. At common law, actions *ex delicto* did not survive, except in a few instances, in which the injured party had the right to waive the tort, and sue in assumpsit. *Patton* v. *Brady, Ex'x*, 184 U. S. 608, 614, 22 Sup. Ct. 493, 46 L. ed. 713; *Phillips* v. *Homfray*, 24 Ch. D. 439; *U. S.* v. *Daniels*, 6 How. 11, 12 L. ed. 323. Actions for mere injuries not resulting in profit to the wrongdoer did not survive either his death or that of the injured party. *Henshaw* v. *Miller*, 17 How. 212, 219, 222, 15 L. ed. 222."

Since it is apparent on the face of plaintiff's complaint that the alleged tortious conduct of the decedent, Henry Horner, did not result in a profit or unjust enrichment, for which the injured party had the right to bring an action of indebitatus assumpsit, the judgment dismissing plaintiff's complaint as against these respondents should be affirmed.

II.

The complaint fails to state a cause of action under the Civil Rights Act.

Due process of law in the determination of the result of a primary election is not denied by vesting the power to make such determination *ad limina* in a quasi-judicial board consisting of the governor, state secretary and state treasurer. (*Taylor* v. *Beckman*, 178 U. S. 545, 44 L. ed. 1187.) Plaintiff's complaint says nothing at all about the procedure followed by the State Primary Canvassing Board, but merely condemns the ruling made by the board with respect to his candidacy. In the petitioner's brief, at page 29, there is interpolated the statement that the ruling of the board was made "without any opportunity to petitioner to be heard in the matter." No such allegation appears in the complaint, nor any allegation that the plaintiff had no recourse to the state court, or that the remedy if any afforded by the state laws was inherently inadequate. For all that appears in the complaint, there is no basis whatever for petitioner's suggestion in his brief that he was not afforded opportunity to be heard, or that he did not in fact obtain a hearing by the state officers, administrative and judicial, entrusted by the state laws with the duty to pass upon plaintiff's claim.*

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* The ruling made by the canvassing board was subject to review by the circuit court, with assurance of prompt hearing, as follows:

§ 62 of Act of July 6, 1927 (L. 1927, p. 459), as amended June 28, 1935 (L. 1935, p. 803); Ill. Rev. Stats. 1939, ch. 46, § 426:

"Any candidate whose name appears upon the primary ballot of any political party in any precinct may contest the election of the candidates nominated by his political party, upon the face of the returns, if he so desires, and may, in said county or any of the precincts thereof as to the office for which he was a candidate, contest the election in such county or precinct by filing

If plaintiff's suit were held to be maintainable, then state election contests could be indirectly shifted to the federal courts, in form of suits for damages, upon the mere allegation that the state officers who decided the contest (or canvassed the votes) adversely to the contestant acted pursuant to a conspiracy to deprive him of rights protected by the federal constitution; or, by the free use of adverbs, charging that the state officers acted "wilfully, maliciously and arbitrarily." Such allegations, as made in the com-

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with the clerk of the county court, except in the case of candidates for the nomination for state and congressional offices and for the office of county judge, a petition in writing, setting forth the grounds of contest, which petition shall be verified by the affidavit of the petitioner or other person, and which petition shall be filed within five (5) days after the completion of the canvass of the returns. The contestant shall also file with the canvassing board, which canvasses the returns for such nomination (and if for the nomination for an office, certified tabulated statements of the returns of which are to be filed with the secretary of state), also with the county canvassing board, a notice of the pendency of the contest. In the case of a contest for the nomination for state and congressional offices and for the office of county judge, said petition shall be filed in the office of the clerk of the circuit court.

"Authority and jurisdiction are hereby vested in the county court or in the judge thereof in vacation, or in the circuit court or in the judges thereof in vacation, as the case may be, to hear and determine primary contests. When a petition to contest a primary shall be filed in the office of the clerk of the court, said petition shall forthwith be presented to the judge thereof, who shall note thereon the date of the presentation, and shall note thereon the day when he will hear the same, which shall not be more than five (5) days thereafter, and shall order issuance of summons to each defendant named in the petition.

"Summons shall forthwith issue to each defendant named in the petition and shall be served in the same manner as is provided in other civil cases. Summons may be issued and served in any county in the state. The case may be heard and determined by the county

plaint here under consideration, do not change the true nature of the complaint, namely, to obtain a decision that the election contest (or canvass of votes) was erroneously decided by the state officers and to subject the officers who made the decision to the penalty of a judgment for damages.

* * * * *

In view of the argument already made in the brief of these respondents opposing the petition for certiorari (point

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or circuit court in term time, or by the judges thereof in vacation, at any time not less than three (3) days after service of process, and shall have preference in the order of hearing to all other cases. The petitioner shall give security for all costs.

"If, in the opinion of the court, in which the petition is filed, the grounds for contest alleged are insufficient in law the petition shall be dismissed. If the grounds alleged are sufficient in law, the court shall proceed in a summary manner and may hear evidence, examine the returns, recount the ballots and make such orders and enter such judgment as justice may require. The court shall ascertain and declare by a decree, as in equity to be entered of record in the proper court, the result of such election in the territorial area for which the contest is made. The judgment of the court shall be final. A certified copy of said decree shall forthwith be made by the clerk of the court and transmitted to the board canvassing the returns for such office, and in case of contest, if for nomination for an office, tabulated statements of returns for which are filed with the secretary of state, also in the office of the county clerk in the proper county. The proper canvassing board, or boards, as the case may be, shall correct the returns or the tabulated statement of returns in accordance with said decree."

See also § 13 of an act in relation to the nomination of members of the general assembly by political parties, and the election of senatorial committeemen, approved July 6, 1927 (L. 1927, p. 1942), as amended by act approved February 15, 1933 (L. 1933, p. 563); Ill. Rev. Stats. 1939, ch. 46, § 456; whereby the provisions of the act above quoted are made specifically applicable to primary elections for nomination of candidates for the general assembly.

I thereof), we deem it unnecessary to comment further on the propositions and authorities set forth in part II of the foregoing "summary of the argument."

Respectfully submitted,

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